Petition

81-470 No.

Office Supreme Court, U.S.
FILED
SEP 8 1981

In The

Supreme Court of the United States

October Term, 1981

LOUIS R. DANIELLO,

Petitioner,

vs.

JOSEPH P. OLIVETI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPERIOR COURT OF THE STATE OF NEW JERSEY

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QUESTIONS PRESENTED

Main

1. 42 U.S.C. §§1981, 1982, 1983, 1985, provide a federal remedy (tort damages) for willful malicious violations of a citizen's federal constitutional and civil rights by public officials.

Can a state grant immunity from such claims to its local municipal officials by virtue of a state immunity statute, in the light of such federal statutes; the federal supremacy clause of the United States Constitution (Art. VI) and such cases as *Testa v. Katt,* 330 U.S. 386, 67 S. Ct. 810, 91 L. Ed. 967 (1947); *Owen v. City of Independence,* 100 S. Ct. 1398, 445 U.S. 622, 63 L. Ed. 2d 850 (1980) and *Gomez v. Toledo,* 100 S. Ct. 1920, 446 U.S. 635, 64 L. Ed. 2d 572 (1980)?

Subsidiary

2. If the state statute confers no immunity under such circumstances, should amendment of the original complaint (against one public official) have been allowed to add additional public officials, who acted to support and defend the original civil rights violations?

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No.

In The

Supreme Court of the United States

October Term, 1981

LOUIS R. DANIELLO,

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vs.

JOSEPH P. OLIVETI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPERIOR COURT OF THE STATE OF NEW JERSEY

The petitioner, Louis R. Daniello, prays that a writ of certiorari issue to review the judgment of the Appellate Division of the Superior Court of the State of New Jersey entered in the above case on April 14, 1981.

OPINIONS BELOW

The opinion of the Superior Court of New Jersey, Law Division, dated March 2, 1981, is not reported.

The opinion of the Appellate Division of the Superior Court of New Jersey dated April 14, 1981 is not reported.

The opinion of the Supreme Court of New Jersey denying certification, dated June 10, 1981 ____ N.J. ____ is not yet reported.

JURISDICTION

Summary judgment at the trial level of the Superior Court of New Jersey was entered March 28, 1980 dismissing complaint (1a).

The judgment on appeal herein sought to be reviewed, was entered in the Appellate Division, Superior Court of New Jersey on April 14, 1981, affirming such dismissal (3a).

Petition to review said judgment on certification to the Supreme Court of New Jersey was denied, by judgment dated June 10, 1981, and this petition for writ of certiorari is filed within 90 days thereof (7a).

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article VI (Supremacy Clause):

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. . . ."

United States Constitution, Amendment 1:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment 14:

> "All persons born or naturalized in the United States, and subject to the jurisdiction therof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . ."

42 U.S.C. §1981 of Federal Civil Rights Act:

"*Equal rights under the law*

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, given evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

42 U.S.C. §1982 of Federal Civil Rights Act:

"*Property rights of citizens*

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

42 U.S.C. §1983 of Federal Civil Rights Act:

"*Civil action for deprivation of rights*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. §1985 of Federal Civil Rights Act:

"*Conspiracy to interfere with civil rights — Preventing officer from performing duties*

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

* * *

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all

persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

New Jersey Tort Claims Immunity Statute 59:3-2(a):

"A. A public employee is not liable for an injury resulting from the exercise of judgment or discretion vested in him."

STATEMENT OF THE CASE

Plaintiff-petitioner Louis R. Daniello worked for the Town of West New York, New Jersey, for 26 years without disciplinary or other problems, and in 1979 had been Superintendant of Public Works for some 7 years, the second highest ranking official in said Department of Public Works.

As such, by West New York, New Jersey, Ordinance #1074 and civil service job description adopted thereby, his duties were to observe and supervise all work, equipment and public works operations on the public streets throughout West New York, New Jersey, and to supervise a 60-man work force working throughout the Town. He inspected daily to make sure no hazardous condition arose in the public streets and to make sure valuable public machinery, equipment and materials as well as manpower were properly safeguarded and utilized (17a-22a).

During said 7-year period his work force worked 7:30 a.m. to 2:30 p.m. and on Saturdays. Plaintiff Daniello worked the same hours. Plaintiff Daniello also had use of one of the department's motor vehicles to visit widely separated work sites, and to observe working conditions throughout the Town.

Plaintiff Daniello regularly performed such duties throughout the Town, and during the same hours that his work force was so employed (7:30 a.m. to 2:30 p.m.) for 7 years, until the local Municipal Election of May 8, 1979.

Defendant-respondent Joseph P. Oliveti was a member of the governing body of West New York, New Jersey, and was the elected Commissioner-Head of said Department of Public Works (on whom the local ordinance and job description was binding), and petitioner's superior during the entire said 7-year period that plaintiff so performed said duties, until the Municipal Election of May 8, 1979.

In the election of May 8, 1979, plaintiff Daniello ran for public office in West New York with other candidates and in association with other citizens, against the ticket on which defendant Joseph P. Oliveti was a candidate, but was not elected. Defendant Oliveti was re-elected and again designated head of the Department of Public Works.

Within a few days of said election of May 8, 1979 and after being so re-elected and designated head of the Department of Public Works, without any lawful cause or reason, defendant Oliveti:

(a) Forbade plaintiff Daniello from performing his duties throughout the Town.

(b) Ordered him to remain all day in an office room in the town garage, and not to leave same.

(c) Ordered him to report for "work" 6:30 a.m. (and thus to get up 5:30 a.m.) while the men did not report until 7:30 a.m.

(d) Ordered him to quit "work" 1:30 p.m., while the men he was supposed to supervise worked until 2:30 p.m.

(e) Forbade him to work Saturdays (overtime pay) although the men he was supposed to supervise worked Saturdays, and thus worked unsupervised by him.

(f) Took away his motor vehicle.

(g) Discontinued the prior practice whereby Daniello took his annual vacation a few days at a time as he preferred.

(h) Made it impossible to verify the regular hours and overtime hours and lawful pay of the work force, which was part of Daniello's duties.

(i) Had Daniello continue to draw his salary from public funds, but without performing any services, a violation of local law.

(j) Where formerly for 7 years the public and the other town departments, such as the Police Department, contacted plaintiff when any questions or problems concerning public works or public streets arose, after said election defendant caused plaintiff to be isolated and by-passed, and all such matters were referred directly to his assistant, the Assistant Superintendant of Public Works, while plaintiff was ignored.

Efforts to have defendant Oliveti desist, and to allow plaintiff to perform his duties as Superintendant of Public Works, were unavailing.

Plaintiff filed suit in the Superior Court of New Jersey alleging among other things:

(a) The willful and malicious depriving by defendant Oliveti of plaintiff's consitutional and civil rights, seeking compensatory and punitive damages for the official misconduct by defendant Joseph P. Oliveti.

(b) Subsequently when the other members of the governing body undertook to expend public moneys to support, further and defend the civil rights violations of defendant, plaintiff moved to amend the complaint to join such public officials.[1]

(c) Seeking restitution to the Town of West New York of the public moneys paid to plaintiff while he was prevented from performing the services, for which such public funds were expended.

---

1. Although the amendment was not granted and such officials are technically not parties to this cause at this time, as potential parties they are hereby listed as follows: Anthony M. DeFino, Paul A. Erbach, James F. Langan and Salvatore Mollica, Town Commissioners.

Although plaintiff contended that fact questions as to the intentional, willful and malicious depriving by defendant Oliveti of constitutional and civil rights of plaintiff required a fact trial for tort damages, the Superior Court on the trial level granted summary judgment on motion without trial.

This was affirmed on appeal by the Appellate Division of the Superior Court on the ground that to the extent that a tort claim existed, it was barred by the New Jersey State Tort Claim Act Immunity Section, N.J.S. 59:3-2(a).

The Appellate Division also referred to remedies before the New Jersey Civil Service Commission, but it is not disputed that the New Jersey Civil Service Commission is an executive department agency which administers the New Jersey Civil Service Law, N.J.S. 11:1-1, and does *not* possess judicial or tort damage jurisdiction for *past* civil rights violations, under *Winberry v. Salisbury*, 5 N.J. 240 (1950) (separation of powers case).

Certification to review such decision by the Supreme Court of New Jersey as the highest court in New Jersey, was denied.

HOW AND WHEN FEDERAL CONSTITUTIONAL AND CIVIL RIGHTS ISSUES WERE RAISED AND DISPOSED OF

Plaintiff raised the question of deprival of constitutional and civil rights in the very first pleading filed, namely the complaint.

Plaintiff did not allege overt acts *prior* to the election of May 8, 1979 to *prevent* him from running for public office, nor did plaintiff claim that running for public office alone was such a civil right as to sustain a tort — damage claim.

In his complaint, however, plaintiff did allege that *after* said election the defendant did abuse his official power to oppress, punish and intimidate plaintiff by tortiously interfering with his job and livelihood in retribution *because* he had run against defendant for public office (this was defendant's motive). Defendant thus interfered with plaintiff's civil and constitutional right ". . . as an American . . ." to associate with others in peaceful and lawful assembly, seek redress of grievances and lawful political association, exercising constitutional rights of free speech and assembly rights; equal protection rights (not be punished tortiously for having exercised lawful rights) and equal privileges and immunities with other citizens; and not to be deprived of employment rights; without due process of law and without lawful cause.

Plaintiff in said complaint directly charged defendant:

> "Paragraph 17. During before and after said election defendant and his other running mates expressed anger and hostility against plaintiff, even though he was exercising his right as an American to put his candidacy before the public as part of the local government election process.
>
> Paragraph 20. Such action unlawfully punishes plaintiff and deprives him of his civil rights to run for public office without fear or intimidation; and tortiously interferes with his right to make a living in the position earned through many years of faithful service, as aforesaid; and his reasonable right to improve economic prospects and expectations, without unlawful oppression.
>
> Paragraph 21. Said action by defendant, JOSEPH P. OLIVETI, was taken solely to hurt, punish, oppress and intimidate plaintiff, and

> other possible political opponents without just cause and for no lawful public purpose; in gross abuse of his public position, in violation of the said ordinance and Civil Service specifications adopted by the Town of West New York, N.J.; in order to serve only the private personal and political advantage of defendant and in violation of his oath of office; though his personal hostility; with express deliberate, knowing and malicious intent to damage and injure plaintiff economically; and damage his livelihood; and to cause him personal suffering and anguish; and to oppress, humiliate, damage and to intimidate him; and others who might oppose defendant politically now or in the future."

Plaintiff sought compensatory and punitive damages.

The trial court dismissed the complaint on summary judgment and did address the question of tort immunity, and found defendant immune under N.J.S. 59:3-2(a).

On appeal to the Superior Court, Appellate Division whose judgment plaintiff seeks to review, plaintiff cited the First Amendment to the United States Constitution and *Elrod v. Burns,* 427 U.S. 347 (1976), 49 L. Ed. 2d 547, 96 S. Ct. 2673, on the point that persons should not suffer in their employment for exercising *First Amendment rights* to support political movements; and *Halperin v. Kissinger,* U.S. Ct. of Appeals, D.C. Cir. 606, F.2 1192(1979), in support of award of damages for *curtailment of constitutional rights.*

The Appellate Division ruled that even if there *were* a tort action as alleged, and even if defendant acted ". . . in retribution . . ." because plaintiff had run for public office against defendant, the state immunity statute conferred immunity under N.J.S. 59:3-2(a).

On petition for certification to the New Jersey Supreme Court, this question was briefed, squarely faced and plaintiff argued that under:

> (a) The Supremacy Clause to the United States Constitution, Article VI, and;
>
> (b) cases such as *Testa v. Katt*, 330 U.S. 386, 67 S. Ct. 810, 91 L. Ed. 967 (1947), that the federal law was supreme, and that a state statute just could *not* confer immunity, as a matter of federal law supremacy.

Further, that under cases such as *Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980), *rehearing denied*, 100 S. Ct. 2979, 64 L. Ed. 2d 850 (1980) and *Gomez v. Toledo*, 446 U.S. 635, 64 L. Ed. 2d 572, 100 S. Ct. 1920 (1980), there could be no immunities created by state statute. If any immunities were to be recognized, it would be on a *federal* level, and then as a *defense* if good will and good faith were shown, which would preclude a dismissal on summary judgment motion, where deliberate, malicious and knowing misconduct was alleged and was sought to be shown factually at trial.

The Supreme Court of New Jersey denied certification June 10, 1981, hence this petition for writ of certiorari.[2]

---

2. Since the state immunity statute was not originally briefed, and the State of New Jersey did not appear, the position of the Attorney General of New Jersey on the question of the validity or applicability of a state immunity statute under such conditions, is unknown. Since plaintiff feels such a statute is inapplicable; and would clearly be repugnant to the federal statutes (Article VI of the United States Constitution) and to the cases cited, therefore under U.S.S.C. Practice Rule 28.4(c) the Attorney General of New Jersey is notified hereby, that 28 U.S.C. §2403(b) may be applicable; and he will be served with copies of the within petition, in case he wishes to appear, move or otherwise participate in this cause.

REASONS FOR GRANTING THE WRIT

The decision of the New Jersey Supreme Court denying certification and affirming the holding of the Appellate Division, Superior Court, that the state statute N.J.S. 59:3-2(a) affords immunity to local municipal officials from tort claims arising from federal civil rights violations, is in conflict with *Testa v. Katt, supra,* and Article VI of the United States Constitution, which hold that in their sphere, federal laws are supreme and are binding on the states.

The concept that the Federal Civil Rights Statutes 42 U.S.C. §§1981, 1982, 1983, 1985 can be amended or modified by state laws, for immunity or otherwise, is repugnant to such case of *Testa v. Katt, supra,* and the Supremacy Clause VI of the United States Constitution.

The decision is in conflict with *Owen v. City of Independance, supra,* and with *Gomez v. Toledo, supra,* since any immunities for civil rights violations can only be recognized on a federal level and cannot be created by state statute. *Owen v. City of Independence, supra,* also stated that 42 U.S.C. §1983 not only provides for damages for actionable civil rights violations, but was also designed:

> "... to serve as a deterrent against future constitutional deprivations, as well."

There would be little deterrent if states could immunize their local officials by state statute. Public officials may not retaliate against or punish lawful exercise of constitutional rights of free speech, free assembly and civil rights, and alleged good faith is not a defense. *Trotman v. Board of Trustees, Lincoln University,* 635 F. 2d 216 (3rd Cir. 1980) (U.S. appeal pending).

The decision purports to "settle" an important question of federal law (that states can lawfully adopt statutes to immunize local municipal officials from tort claims under federal civil rights laws) in conflict with *Testa v. Katt, supra; Owen v. City of Independence, supra;* and *Gomez v. Toledo, supra.*

Review by the Supreme Court is necessary to confirm that under the Supremacy Clause VI to the United States Constitution and the cases cited, federal supremacy and uniformity requires that apparent exceptions and immunities to the Federal Civil Rights Act cannot be created by state statute, lest there be 52 immunity statutes for the various states, plus perhaps the District of Columbia and Puerto Rico, etc.

The total confusion and frustration of congressional intent that would follow is evident, plaintiff submits, and this case should not be permitted to become a precedent establishing such a result.

CONCLUSION

For these reasons petitioner submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

s/ JOHN TOMASIN
Attorney for Petitioner

APPENDIX A — ORDER DISMISSING COMPLAINT OF THE NEW JERSEY SUPERIOR COURT (TRIAL LEVEL) DATED MARCH 28, 1980

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : HUDSON COUNTY

SYDNEY ISADORE TURTZ
6000 Tyler Place
West New York, N.J. 07093
(201) 854-0700
Attorney for Defendant

Docket No. L-63369-78

Civil Action

LOUIS R. DANIELLO

Plaintiff

vs.

JOSEPH P. OLIVETTI

Defendant

Civil Action

ORDER FOR SUMMARY JUDGMENT

This matter coming on to be heard in the presence of John Tomasin, Esq., attorney for plaintiff and Sydney I. Turtz Esq., attorney for defendant, upon defendant's motion for summary judgment, and upon plaintiff's cross-motion for partial summary judgment; and the court having considered the pleadings, affidavits, argument of counsel, and the briefs, on behalf of the

respective parties; and good cause therefor appearing for the reasons stated in the oral opinion of the court which is herein incorporated by reference and made a part hereof; and Mr. Tomasin having consented as to form,

IT IS on this 28th day of March, 1980 ORDERED AND ADJUDGED as follows:

1. Defendant's motion for summary judgment in favor of defendant and dismissing the complaint of the plaintiff is hereby granted.

2. Plaintiff's motion for partial summary judgment be and the same is hereby denied.

s/ Lawrence Bilder
J.S.C.

APPENDIX B — JUDGMENT AFFIRMING DISMISSAL OF THE SUPERIOR COURT, APPELLATE DIVISION DATED APRIL 14, 1981

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3296-79

LOUIS R. DANIELLO,

Plaintiff-Appellant,

v.

JOSEPH P. OLIVETI,

Defendant-Respondent.

Submitted March 10, 1981 — Decided Apr. 14, 1981

Before Judges Fritz, Polow and Joelson.

On appeal from Superior Court of New Jersey, Law Division, Hudson County.

John Tomasin, attorney for appellant.

Sydney I. Turtz, attorney for respondent.

PER CURIAM

Plaintiff is the superintendent of public works for West New York and an unsuccessful candidate for election as

Appendix B

Commissioner, losing to defendant. His complaint charges in essence that in retribution for his running the demands of his job have been so altered by defendant as to make the situation essentially intolerable. He appeals from the dismissal of the complaint on defendant's motion. We affirm.

If plaintiff's action is one in tort, it is frustrated by the immunity granted by the New Jersey Tort Claims Act, *N.J.S.A.* 59:1-1 *et seq.*, and *N.J.S.A.* 59:3-2a. If it is otherwise, plaintiff has failed to exhaust his administrative remedies in a matter which, if anything, seems particularly appropriate for Civil Service Commission consideration. *N.J.S.A.* 11:22-11; *Essex Coun. #1, N.J. Civ. Serv. Assoc. v. Gibson,* 118 *N.J. Super.* 583 (App. Div. 1972).

Affirmed.

A True Copy
s/ Elizabeth McLaughlin
Clerk

APPENDIX C — ORDER DENYING AMENDMENT TO COMPLAINT DATED MARCH 28, 1980

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION — HUDSON COUNTY
DOCKET NO.: L 63369-78

CIVIL ACTION

LOUIS R. DANIELLO,

Plaintiff,

vs.

JOSEPH P. OLIVETI,

Defendant.

Civil Action

ORDER

Motion to add additional parties defendant having been made by plaintiff, through John Tomasin, Esq., attorney; Sydney I. Turtz, Esq., representing existing defendant; and Summary Judgment for defendant having been granted on the main case; motion to amend the complaint to add additional parties is accordingly denied, this 28th day of MARCH, 1980.

s/ John J. Geronimo
JOHN J. GERONIMO, J.S.C.

Appendix C

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

s/ W. LEWIS BAMBRICK
Clerk

APPENDIX D — JUDGMENT DENYING CERTIFICATION OF THE SUPREME COURT OF NEW JERSEY DATED JUNE 10, 1981

SUPREME COURT OF NEW JERSEY
SEPTEMBER TERM 1980

18,559 C-666

FILED JUNE 12, 1981
Stephen W. Townsend
Clerk

LOUIS R. DANIELLO,

Plaintiff-Petitioner,

vs.

JOSEPH P. OLIVETI,

Defendant-Respondent.

On Petition for Certification

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-3296-79 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 10th day of June, 1981.

s/ Stephen W. Townsend
Clerk

APPENDIX E — TRANSCRIPT OF ARGUMENT ON SUMMARY JUDGMENT DATED MARCH 28, 1980

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION — HUDSON COUNTY
DOCKET NO. L-63369-78
APPEAL NO. A-3296-79

LOUIS R. DANIELLO,

Plaintiff,

vs.

JOSEPH P. OLIVETTI,

Defendant.

Friday, March 28, 1980
Hudson County Courthouse
Jersey City, New Jersey

BEFORE:

THE HONORABLE LAWRENCE BILDER, J.S.C.

APPEARANCES:

JOHN TOMASIN, ESQ.,
Attorney for the Plaintiff.

SYDNEY I. TURTZ, ESQ.,
Attorney for the Defendant.

Appendix E

Reporting Services Arranged Through:

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769 Northfield Avenue
West Orange, New Jersey 07052
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THE COURT: These are motions 281 and 400, cross motions given different numbers for whatever reason. 321-80. All right.

Now, I have read all of your material. Mr. Turtz, anything you want to add?

MR. TURTZ: Just one comment, if I may, your Honor, the motion by the defendant for summary judgment upon the three grounds stated do not rely upon the facts or dispute with respect to the facts in the case. It is based strictly on issues of law. We say whatever facts are disputed in the case will probably go before the Department of Civil Service.

THE COURT: Well, you argue that in your motion. Please, I've read all your papers. Don't repeat what you said.

MR. TURTZ: Forgive me for being—

THE COURT: I say, is there anything else?

MR. TURTZ: No, that's all right.

Appendix E

THE COURT: You put a lot of time in your brief and if I hadn't read it, it would be an outrageous thing for all the time you put in it.

Anything you want to add?

MR. TOMASIN: Yes, your Honor. I want to call your Honor's attention, on the record, to a typographical error in the affidavit of Louis Daniello that was filed—

THE COURT: Page?

MR. TOMASIN: Page 3.

THE COURT: Page 3?

MR. TOMASIN: Tenth line from the bottom.

THE COURT: Yes, sir.

MR. TOMASIN: That sentence begins: "The defendant is not preventing me from doing these important duties—

THE COURT: Wait a minute. Oh, I got you.

MR. TOMASIN: It is from the entire affidavit and all of the proofs, of course, the typographical error is that the word not shouldn't be in there. It should read: "The defendant is preventing—

THE COURT: Is preventing? I understand.

Do you have any objection to the correction being noted?

MR. TURTZ: None.

THE COURT: Correction is noted. The word none will be struck as a typographical error on Page 3.

Anything else?

MR. TOMASIN: Your Honor, simply to summarize, we believe that the so-called Civil Service issue is not an issue because all of the rates of the defendant insofar as the Civil Service contends are, as he said, protected. He hasn't been taken away from his pay and so forth and I believe summary judgment is to be given to the plaintiff and summary judgment on behalf of the plaintiff-defendant should be denied.

THE COURT: Okay.

Anything else?

MR. TURTZ: With your permission, without trying to delay matters, in one of my arguments on the motion for summary judgment I had urged that no application had been made to the Department of Civil Service for an adjudication of rights and that they had not exhausted their administrative remedies.

THE COURT: Right.

MR. TURTZ: Mr. Tomasin, in his answering brief, discloses that the so-called letter which was supposed to have

been written to the Civil Service Commission was, in fact, a copy of a letter which he had sent to the Commissioner of the Department of Public Works without requesting any Civil Service relief or anything at all. I just want to call that to the Court's attention. That's the letter dated May 24th.

THE COURT: I understand, I remember that.

Anything else?

MR. TURTZ: No, sir.

MR. TOMASIN: No, sir.

THE COURT: All right. This is essentially a dispute between the Superintendent of Public Works of the Town of West New York and its immediate superior, the defendant Director of the Department of Public Works. And what it—the gist of the complaint is that the defendant Director of Public Works has changed the hours of employment, the work hours of the plaintiff in that he is directing him to be at work from 6:30 in the morning whereas in the past he had done it at 7:30 in the morning and that he required him to do more—spend more time in the office and less time driving around personally supervising.

Now, essentially, this is a dispute as to how the boss is going to require his immediate junior to carry out the functions of his job. In other words, it all has to do with supervision by—a dispute with respect to hours. The Director of the Department of Public Works is supervising the Superintendent of Public Works and the hours that the defendant—that the Superintendent plaintiff is to work.

Appendix E

Underlying the complaint is the motion that this is political harassment, that the defendant Director is motivated by political consideration. That's precisely and exactly the reason why the people of the State of New Jersey created the Civil Service system. The defendant is in the Civil Service and if he thinks he's being discriminated against for political reasons and if he thinks that the—that what is being done to him is inappropriate and improper, it is his responsibility to take it to the Civil Service Commission. I don't have to decide whether he did or didn't apply to the Civil Service Commission. If he didn't, that's the route to go, it is the only route that he may go. If he did go and he is discontent, then his appeal goes to the Appellate Division. So I don't have to decide the question as to whether there has or has not been any attempt to go the administrative route because in either event the case doesn't belong here.

Now, with respect to any possibility that the plaintiff may be entitled to bring an action against the defendant individually as opposed to a suit against him in his representative capacity, that also must fail. The action he's complained of are all of a public nature. The complaints all related to acts undertaken by the Director of the Department of Public Works in his official capacity. There can be no action brought against him with respect to that. This was true before the tort claims act, *O'Connor v. Hahn, 111 V Super Appellate Division 1970* and has been continued on under the New Jersey tort claims act NJSA 59:3-2(a) which provides that a public employee is not liable for an injury resulting from the exercise of judgment or discretion vested in him. That would assume, arguendo, that there is injury in telling the guy that he's got to go to work at 6:30 instead of 7:30 or that he is not to ride around the town

supervising the individual jobs, but is to stay in the office doing the job which the person upon whom the responsibility for deciding how the Department is to be run reposes.

The motion—now, I have to be very careful here—the defendant's motion for summary judgment is granted. That's number 281. And the plaintiff's cross motion is denied. An order will be entered, therefore, dismissing the action. Order to be submitted.

Thank you very much.

MR. TOMASIN: Your Honor?

THE COURT: Now listen, what about cost? This will be without cost. Is that right, Mr. Turtz?

MR. TURTZ: Without cost.

MR. TOMASIN: By way of bifurcation, your Honor I just want to ask your Honor whether your Honor is ruling that there is no tort cause of action because your Honor has found that the defendant Olivetti's actions are actions that he had been conducting in his official capacity. Is that correct?

THE COURT: Sure, that's right.

MR. TOMASIN: Because we are arguing that he's going outside his official duties.

THE COURT: I'm not going—you're not going to reargue. I have made my ruling, I have given my opinion. You are free to go to the Appellate Division.

MR. TOMASIN: Yes, I just want the record clarified for that purpose, your Honor, on the Civil Service question. I don't quite understand because your Honor said I don't have to rule on the Civil Service question.

THE COURT: Let me tell you something, Mr. Tomasin, so you and I understand each other. I've given my opinion, I'm not going to say things after my ruling in which I may, inadvertently and without intending to do so, foul up what I have done. If you want to know what I said, get a transcript. I believe that everything I said up to the point where I said that the motion would be—that Mr. Turtz's motion would be granted, your motion would be denied and that a judgment would be entered dismissing the suit, I think that I've covered everything and I'm going to stand by that. I'm going to add nothing to it by engaging in explanations of my opinion or in colloquy. I'm going to undo what I have, I think with some thought, done.

You get a transcript. I won't engage in further colloquy.

MR. TOMASIN: I see. I was just asking your Honor for clarification. Your Honor can decide whether he needs clarification.

THE COURT: I'm not going to clarify and I withdraw whatever clarification I've already put in. My opinion is on the transcript. You are free to get it.

I believe in my transcript I've covered everything and I'm going to let it go with that. I'm withdrawing whatever I may have said afterwards. Clarification doesn't clarify, it screws it up. Okay?

MR. TURTZ: Yes, sir.

THE COURT: Thank you very much, gentlemen.

(Whereupon, the proceedings are concluded.)

* * *

CERTIFICATE

I, DONNA TURSI, a Shorthand Reporter of the State of New Jersey, do hereby state that the foregoing is a true and accurate transcript of my stenographic notes of the within proceedings, to the best of my ability.

s/ Donna Tursi
Donna Tursi

APPENDIX F — ORDINANCE #1074, TOWN OF WEST NEW YORK, NEW JERSEY (UNRELATED JOB TITLES OMITTED)

Ex. A

TOWN OF WEST NEW YORK
HUDSON COUNTY, N.J.
ORDINANCE #1074

AN ORDINANCE ADOPTING NEW JERSEY STATE CIVIL SERVICE SURVEY OF ALL JOBS, POSITIONS, CLASSIFICATIONS AND EMPLOYEES OF THE TOWN OF WEST NEW YORK; ADOPTING RECLASSIFICATION PLAN REORGANIZING ALL DEPARTMENTS, JOBS, POSITIONS, CLASSIFICATIONS, OFFICERS AND EMPLOYEES; WITH ALLOCATION OF TITLES; JOB AND WORK DESCRIPTIONS AND CURRENT SALARY RANGES; AND REPEALING INCONSISTENT ORDINANCES.

WHEREAS, the New Jersey Civil Service Department has concluded a complete survey of the duties and titles of all jobs, positions, titles, officers and employees of the Town of West New York (excluding the Police Department and Fire Department), and,

WHEREAS, the New Jersey Civil Service Department has submitted to the governing body the results of this survey in three separate and distinct schedules containing the information and recommendations listed as follows:

SCHEDULE I

1. A list of employees, together with their dates of last permanent appointment.

2. Their present status, title and divisional classification.

Appendix F

3. Their proposed title and divisional classification.

4. The titles contained therein are hereby listed:

Account Clerk

* * *

Public Works Superintendent

* * *

Welfare Investigator

SCHEDULE 2

Class specifications in alphabetical order, including definitions, examples of work, educational and experience requirements and knowledge and abilities.

SCHEDULE 3

1. An alphabetical list of titles of full-time positions in the Classified Service with divisional classifications and title code numbers.

2. A schematic list of titles of full-time positions in the Classified Service with divisional classifications.

3. An alphabetical list of titles of part-time positions in the Classified Service with divisional classifications and title code numbers.

4. An alphabetical list of titles in the Unclassified Service with the statutory or other provisions placing the positions in the Unclassified Service and title code numbers.

Appendix F

WHEREAS, the Governing Body of the Town of West New York, is desirous of cooperating with the New Jersey Civil Service Department; and,

WHEREAS, the Governing Body of the Town of West New York, is aware of the necessity for establishing a sound personnel policy for the Town; and,

WHEREAS, the Governing Body of the Town of West New York, feels that the legal creation and classification of positions held by employees of the said Town will provide the security necessary for proper working relations between the Governing Body and the employees of said Town, resulting in a more efficient administration of the Town's affairs and the providing of better service for the community at large;

NOW, THEREFORE, the Governing Body of the Town of West New York, DOES ORDAIN:

1. The said survey and related reclassification plan, as recommended by said State Civil Service Department, are hereby approved and hereby adopted, and incorporated herein by reference as though set forth herein at length.

2. The said survey and reclassification plan, with all parts and schedules, thereof, including those above referred to, as amended, together with schedule of salary ranges, have been filed in the office of the Town Clerk of West New York, N.J., where they shall be kept on permanent file, and are all expressly approved and adopted and incorporated herein by reference, as though set forth herein at length.

Appendix F

3. This Ordinance shall take effect immediately and all previous ordinances, inconsistent herewith, are hereby repealed.
Introduced: March 1, 1972
Adopted: March 15, 1972

JAMES F. LANGAN,
HENRY G. LYNCH,
JOSEPH P. OLIVETI,
ANTHONY M. DE FINO,
Board of Commissioners.

ATTEST:
RAYMOND F. GABRIEL,
Town Clerk.

STATEMENT

The foregoing ordinance having been previously adopted for first reading and published, was further considered by the Mayor and Board of Commissioners of West New York, N.J. on March 15th, 1972, and at said date was duly and finally adopted, after public hearing thereon.

RAYMOND F. GABRIEL,
Town Clerk.

L 5628 Mar. 18—$12.60

APPENDIX G — JOB DESCRIPTION, SUPERINTENDENT OF PUBLIC WORKS, ADOPTED BY ORDINANCE #1074 (UNRELATED JOB DESCRIPTIONS OMITTED)

Ex. B.

PUBLIC WORKS SUPERINTENDENT

DEFINITION: Under direction, has charge and supervises the work involved in the installation, maintenance and repair of public works facilities; does related work as required.

EXAMPLES OF WORK: Executes plans for the effective utilization of available funds, personnel, equipment, materials and supplies; organizes and develops suitable work programs for the varied functions of the department; gives suitable assignments and instructions to individuals and groups and supervises their work; make recommendations to superiors concerning disciplinary measures, promotions and appointments of employees under his supervision; supervises employees engaged in the work involved in the construction, maintenance and repair of streets and sewers and in the installation, maintenance, and repair of pipes, valves, pumps, hydrants and other water service equipment; makes investigations of complaints and takes proper action to see that needed repairs are made with a minimum delay; supervises the work involved in sweeping streets and shoveling accumulations into containers and onto trucks; in loading, unloading, and applying sand and street repair materials where needed; in cutting brush and mowing grass, and in emptying refuse containers, loading refuse and disposal of the refuse; assures that proper safety precautions are taken by employees at work; inspects and checks work in progress or completed to see that proper procedures are followed; prepares suitable reports; obtains, stores, safeguards, and supervises the proper use of needed equipment, materials, and supplies; keeps needed records and files.

Appendix G

REQUIREMENTS:

1. Graduation from High School, or Vocational High School, or possession of an approved High School Equivalent Certificate.

2. Three years of supervisory experience in the construction, maintenance and repair of streets, sewer, water, sanitation or other public work facilities or similar heavy construction or maintenance work.

3. Thorough knowledge of the proper procedures used in making routine and complex repairs to water and sewer equipment, and in the construction, maintenance and repair of streets.

4. Ability to organize assigned work; to give suitable assignments and instructions to groups and individuals; to prepare suitable reports; and to keep needed records and files.

5. Good health and freedom from disabling physical and mental defects which would impair the proper performance of the required duties or which might endanger the health and safety of oneself or others.

* * *

Opposition

Office - Supreme Court, U.S.
FILED
OCT 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-470

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LOUIS R. DANIELLO,

Petitioner,

vs.

JOSEPH P. OLIVETI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SYDNEY I. TURTZ,
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Joseph P. Oliveti,
6000 Tyler Place,
West New York, New Jersey 07093
(201) 854-0700

N.J. Appellate Printing Co., Inc., South Plainfield, New Jersey (201) 753-0200

QUESTIONS PRESENTED

1) The petitioner having failed to invoke or rely upon 42 U.S.C. §1983 before the Superior Court of New Jersey, the Court of first instance, and having failed thereafter to invoke or rely upon 42 U.S.C. §1983 on appeal to the Appellate Division, may he now, without having afforded the State Courts an opportunity to rule upon the issue as to whether the "New Jersey Tort Claims Act" is repugnant to 42 U.S.C. §1983, seek a writ of certiorari on this issue.

2) Is *N.J.S.* 59:3-2(a) which provides that "a public employee is not liable for an injury resulting from the exercise of judgment or discretion vested in him," repugnant to U.S.C. §1983.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981 DOCKET NO. 81-470

LOUIS R. DANIELLO,

Petitioner,

vs.

JOSEPH P. OLIVETI,

Respondent.

Brief on Behalf of Respondent, Joseph P. Oliveti in Opposition to Petition of Louis R. Daniello for a Writ of Certiorari

---

The respondent, Joseph P. Oliveti, respectfully urges that petitioner's application for a writ of certiorari "to review the judgment of the Appellate Division of the Superior Court of the State of New Jersey, entered in the above case on April 14, 1981" should be denied.

There are no special or important reasons existent for the issuance of the writ.

The application is devoid of any of the considerations set forth in *Rule* 197 as a basis for invoking the "sound judicial discretion" of the Supreme Court of the United States to grant the requested review.

The issue sought to be projected here—namely—whether the "New Jersey Tort Claims Act" is repugnant to 42 U.S.C. §1983, was not decided by the State Courts of New Jersey is this case, in any manner whatsoever.

JURISDICTION

The invocation of the jurisdiction of the Supreme Court of the United States under 28 U.S.C. §1257(3) is improper and unwarranted.

The federal question sought to be reviewed here—namely—Whether the "New Jersey Tort Claims Act (*N.J.S.* 59:1-1 *et seq.*) and particularly *N.J.S.* 59:3-2(a) thereof, is repugnant to 42 U.S.C. §1983, was never raised below. 42 U.S.C. §1983 was never pleaded, never urged, never briefed, never argued in the Superior Court of New Jersey, the Court of first instance. Likewise 42 U.S.C. §1983 was never referred to or urged on appeal to the Appellate Division of the Superior Court. Neither the Superior Court of New Jersey, nor the Appellate Division of the Superior Court, ever passed on the issue. It simply had not been presented to the Court—at trial or appellate level.

There is no adjudication in this matter by a State Court drawing the validity of *N.J.S.* 59:3-2(a) into question on the ground that it is repugnant to 42 U.S.C. §1983.

The invocation of jurisdiction under 28 U.S.C. § 1257(3) is unwarranted and erroneous.

ADDITIONAL STATUTORY PROVISIONS

The New Jersey Statute dealing with "Liability and Immunity of Public Employees" (*N.J.S.* 59:3-1 *et seq.*) provides:

N.J.S. 59:3-1

> a) Except as otherwise provided by this Act, a public employee is liable for injury caused by his act or omission to the same extent as a private person.

b) The liability of a public employee established by this Act is subject to any immunity of a public employee provided by law and is subject to any defenses that would be available to the public employee if he were a private person.

N.J.S. 59:3-14

a) Nothing in this Act shall exonerate a public employee from liability if it is established that his conduct was outside the scope of his employment or constituted a crime, actual fraud, actual malice or willful misconduct.

b) Nothing in this Act shall exonerate a public employee from the full measure of recovery applicable to a person in the private sector if it is established that his conduct was outside the scope of his employment or constituted a crime, actual fraud, actual malice or willful misconduct.

COUNTER-STATEMENT OF THE CASE

At the outset it is emphasized that the within action is not an action against a municipality. It is an action against an individual—the Respondent—JOSEPH P. OLIVETI.

The Respondent is the Director of the Department of Public Works in the Town of West New York, a municipal corporation of the State of New Jersey. The Petitioner is the Superintendent of Public Works in the Department of Public Works and the Respondent is his immediate superior. The position held by the Petitioner is in the classified civil service and is subject to the Civil Service statutes of the State of New Jersey, and the rules, regulations and procedures promulgated thereunder.

In May 1979, the Respondent, as the Director of the Department of Public Works directed the Petitioner to report for work daily at 6:30 A.M., to 1:30 P.M. The prior hours had been 7:30 A.M. to 2:30 P.M. The Respondent was of the considered opinion that the stated hours were better suited for the performance by Petitioner of his supervisory and executive functions as delineated in his job description. (See Appendix G—Petitioner's Brief, pg. 21a). The Respondent was of the opinion that Petitioner should give greater emphasis to the executive functions set forth in the job description. Respondent was of the opinion that if said supervisory and executive functions were carried out during the hours stated and if Petitioner gave greater emphasis to the executive requirements of his position—that this would be in the best interest of the Department and in the best interest of the Town of West New York.

No change was made in Petitioner's job title. No change was made in his salary or emoluments. He was not demoted in any respect.

All action taken by the Respondent was taken in his official capacity as a Commissioner of the Town of West New York and as the Director of the Department of Public Works. All action taken by the Respondent was taken within the legal authority vested in him as a Commissioner of the Town of West New York, operating under the Commission form of government (*N.J.S.* 40:70-1 *et seq.*) and under Civil Service Law (*N.J.S.* 11:19-1 *et seq.*), the same having been adopted by the Town of West New York.

It was specifically denied, by certification of the Respondent and by his answer, that the political rivalry between Petitioner and Respondent played any part in Respondent's determination as to what was in the best interests of the Town and in the best interests of the

department. The Petitioner's complaint in the Superior Court, containing numerous unwarranted conclusions, innuendoes, misstatements and self-serving characterizations, was never verified by certification or affidavit. The answer of the Respondent, verified by certification, denied the allegations of the Complaint.

Petitioner's current recital of the facts (Petitioner's brief pgs. 6-9 incl.) are a self-serving presentation of unwarranted conclusions, half truths, inaccuracies and self-imposed and self-inflicted hurts, grievances and damages.

Petitioner's current recital of the facts has heretofore been presented to the Superior Court of New Jersey; to the Appellate Division of the Superior Court of New Jersey; and to the Supreme Court of the State of New Jersey. Those Courts had the full benefit of Petitioner's presentation of "facts." Those Courts likewise had the full benefit of the specific answers to and denials of Petitioner's assertions of "Facts."

On the basis of the change in hours and the direction that Petitioner give greater emphasis to the executive functions of his job—and desist from running around the town in a motor vehicle supposedly supervising men on the job—(in fact there are three foremen and an assistant superintendent who render "on the street" or "on the job" supervision), the Petitioner *now* seeks to assert a deprivation of Civil Rights.

It was specifically denied below that Petitioner was forbidden from performing his duties throughout the town; (Petitioner's brief pg. 8). It was denied below that Petitioner was ordered to remain all day in an office in the town garage and not to leave the same. (Petitioner's brief pg. 8). These are Petitioner's characterizations without basis with respect to the directive that he give greater emphasis to his executive responsibilities.

It was admitted below that Petitioner's hours of employment were changed from 7:30 A.M., — 2:30 P.M., to 6:30 A.M.—1:30 P.M. But this in no way supports Petitioner's innuendo that the men in the Department were unsupervised or would go unsupervised at any time. (Petitioner's brief pg. 8). As stated, there are three foremen and an assistant superintendent who render adequate supervision.

To the same effect with respect to each and every of subparagraphs (e), (f), (g), (h), (i) and (j)—(Petitioner's brief pg. 8-9), these are petitioner's characterizations.

Petitioner's brief (pg. 9) states that petitioner filed suit in the Superior Court of New Jersey alleging among other things: "(a) The willful and malicious depriving by defendant Oliveti of plaintiff's constitutional and civil rights seeking compensatory and punitive damages for the official misconduct by defendant, Joseph P. Oliveti."

A careful examination of the voluminous complaint (17 pages — 8 counts) discloses that no reference is made therein to "constitutional" rights. The term "constitutional" is never once mentioned in the complaint. And as to "civil rights" the single isolated reference to "civil rights" is contained in paragraph 20 of the first count of the complaint as set forth in Petitioner's brief at page 11. At no other place is the term "civil rights" used. And the passing reference to "civil rights" refers to "his civil rights to run for public office without fear or intimidation." Factually, the petitioner has never asserted in any way that he was in fact stopped from running for public office. He has referred to no election for public or private office in which he was or wanted to be a candidate but was prevented from so being or so doing by action of the Respondent.

Returning to the complaint which Petitioner states "directly charged the defendant" (Petitioner's brief pg.

11) with having deprived plaintiff of his "civil rights," again an examination discloses that not a single reference is made to 41 U.S.C. §1983 or that the action was brought under the Federal Statute. Not a single word.

At page 13 of Petitioner's brief, it is self-servingly asserted:

> "on petition for certification to the New Jersey Supreme Court, this question was briefed, squarely faced. . . ."

It is an absolute fact that the complaint as filed in the Superior Court of New Jersey by the petitioner; his motion for summary judgment which was denied; and his appeal to the Appellate Division of the Superior Court of New Jersey from the order granting summary judgment to the defendant dismissing the complaint, made absolutely no reference whatsoever and made no claim whatsoever and sought no relief whatsoever under 42 U.S.C. §1983.

It is a further fact that the petitioner *for the first time* on his Petition for Certification to the Supreme Court of New Jersey, made reference to 42 U.S.C. §1983. It was urged in the brief in Opposition to the Petition for Certification to the Supreme Court of New Jersey, among other things, that 42 U.S.C. §1983 was not the basis upon which the action below had been brought and that relief had not been sought under 42 U.S.C. §1983. The Petition for Certification was denied.

The assertion by the Petitioner that "this question was briefed, squarely faced. . . ." "On petition for certification to the New Jersey Supreme Court" (Petitioner's brief, pg. 13) deliberately bypasses the fact that prior to the Petition for Certification to the Supreme Court of New Jersey, 42 U.S.C. §1983 was never invoked, never relied on, and never urged by Petitioner as a basis for

redress. It was never an issue before the Superior Court of New Jersey or before the Appellate Division. And it was improperly before the Supreme Court of New Jersey on the Petition for Certification which was denied. Additionally, with respect to the self-serving assertion that "this question was briefed, squarely faced. . . ." (Petitioner's brief pg. 13), see also the footnote at page 13 of Petitioner's Brief.

The Superior Court of New Jersey in granting summary judgment dismissing the Complaint did so on strict questions of law. (1) The Petitioner had failed to exhaust his administrative remedies—namely—resort to the Civil Service Commission; and (2) under the New Jersey Tort Claims Act, and even prior thereto, a public employee is not liable for injury resulting from the exercise of judgment or discretion vested in him.

The Appellate Division of the New Jersey Superior Court in affirming likewise did so on strict questions of law.

The Supreme Cout of New Jersey, in denying certification had before it the entire record below, the briefs, the pleadings, the certifications and affidavits. It had before it all of Petitioner's recitals of his alleged grievances, alleged deprivations, alleged damages. It also had before it the unalterable fact that this action had never been brought under 42 U.S.C. §1983. Certification was denied.

One final fact must be brought to the attention of the Court, and counsel as an officer of the Court does hereby so represent and certify as to the following:

The Superior Court of New Jersey rendered its opinion on March 28, 1980, dismissing Petitioner's complaint. Notice of Appeal was filed on May 7, 1980. Thereafter, and while the matter was pending in the

Appellate Division of the New Jersey Superior Court, Petitioner filed a Complaint with the New Jersey Civil Service Commission dated January 19, 1981, in which reference was made to the action pending in the New Jersey Superior Court, Appellate Division, but referring and allegedly seeking relief for other and additional grievances. Thereafter on April 24, 1981, the Petitioner amended and supplemented his complaint to the Civil Service Commission of the State of New Jersey dated January 19, 1981, so as to add thereto, and seeking relief with respect thereto, the alleged grievances complained of in the case here under consideration. The Petition for Certification to the Supreme Court of New Jersey made no mention of the pendency of the matter before the New Jersey Civil Service Commission. The instant Petition for a Writ of Certiorari likewise makes no mention of the pendency of the action before the Civil Service Commission of the State of New Jersey. In a reply brief addressed to the fact that Respondent had brought to the attention of the New Jersey Supreme Court the pendency of the Civil Service matter, petitioner attempted to explain away his reasons for not advising the Court of the pendency of the Civil Service matter. But he still withheld the fact that the Civil Service Complaint had been amended to encompass the grievances alleged in the instant case and that this had been done several weeks before the Petition for Certification to the New Jersey Supreme Court.

It is a fact that there is now pending before the Civil Service Commission of the State of New Jersey, a proceeding in which the allegations and subject matter of the case here under consideration has been brought to that body by the petitioner here, on a formal complaint seeking relief.

REASONS FOR DENYING THE WRIT OF CERTIORARI

1) There was no adjudication below that the rights conferred upon petitioner by 42 U.S.C. §1983 had been vitiated by *N.J.S.* 59:3-2(a). The petitioner never brought an action under 42 U.S.C. §1983. He never relied on 42 U.S.C. §1983 and at no place did he urge to the Superior Court of New Jersey or to the Appellate Division of the Superior Court of New Jersey that his rights under the Federal Statute had been violated and that this action sought redress under 42 U.S.C. §1983. There was nothing before the Court, at trial or Appellate level, which required a determination as to whether *N.J.S.* 59:3-2(a) was repugnant to 42 U.S.C. §1983. Factually, Petitioner suffered no deprivation of "civil rights." He hasn't pointed out a single "civil right" of which he has been deprived other than the fleeting assertion that he was deprived "of his civil rights to run for public office without fear or intimidation." In which election or for which office he does not state. The "fear and intimidation" is self-imposed and self-inflicted. Nothing in the case at bar warranted the "fear and intimidation." As stated in the opinion of the Superior Court: ". . . This is essentially a dispute between the Superintendent of public works of the Town of West New York and its immediate superior, the defendant Director of the Department of Public Works . . . the gist of the complaint is that the defendant Director of Public Works has changed the hours of employment, the work hours of the plaintiff in that he is directing him to be at work from 6:30 in the morning whereas in the past he had done it at 7:30 in the morning and that he required him to do more—spend more time in the office and less time driving around personally supervising." (Petitioner's brief, pg. 12a). He was not demoted. His salary was not changed or reduced. It is respectfully suggested

that this entire action from its inception was a political ploy engaged in by the Petitioner to harass, annoy and bedevil the Respondent in the operation of the Department of Public Works of the Town of West New York.

The fact is that the Respondent, in no way, under color of any statute, ordinance, regulation, custom or usage of any State or Territory subjected or caused petitioner to be subjected to a deprivation of any right, privilege or immunity whatsoever. 42 U.S.C. §1983. He never so pleaded or urged. And these recent assertions are a grasping at straws. The judgments of the Superior Court of New Jersey, and of the Appellate Division of the Superior Court, and the denial of certification by the Supreme Court of New Jersey, in the light of what was before those tribunals, were eminently correct. But of paramount importance, the Superior Court of New Jersey, the Appellate Division of the Superior Court, and for that matter the Supreme Court of New Jersey in its denial of certification did not rule on the issue of repugnancy. They were never given the opportunity to do so. This is not a case in which the jurisdiction of the Court may be invoked under 28 U.S.C. §1257(3) and accordingly the Petition for a Writ of Certiorari, should be denied.

2) *N.J.S.* 59:3-2(a) is not repugnant to the Constitution, treaties or laws of the United States. It does not "immunize" local municipal officials from the provisions of 42 U.S.C. §1983, nor does it attempt or profess to do so. The provision was intended to codify the long existing law of the State of New Jersey which granted immunity to a public employee for the exercise of discretion or judgment within the scope of his duties. This statute is not unique to the State of New Jersey. It is also the law of other jurisdictions throughout the United States. It is also the law of the Federal Government. (28 U.S.C. 2680) (See comment—1972 to *N.J.S.A.* 56:3-2). The Tort

Claims Act preserves common law immunities. *Woodsum v. Pemberton Township*, 172 N.J. Sup. 489, 517 (Law Div. 1980).

The opportunity was never presented below to argue whether the New Jersey Tort Claims Act, and particularly *N.J.S.* 59:3-2(a) was repugnant to or barred an action for a violation of Civil Rights under 42 U.S.C. §1983, or that Civil Rights could be denied by the passage of state legislation. These issues were never raised in the Superior Court or in the Appellate Division. This in no wise concedes that an action for a violation of civil rights would in any event be appropriate here under 42 U.S.C. §1983. It merely emphasizes that no such action was brought. In addition it is respectfully urged that no cause of action contemplated by 42 U.S.C. §1983 is stated in the within action. The Petitioner was deprived of no rights whatsoever. Petitioner does not say that he is or has been prevented from running for public office. He tacitly admits that he has not been deprived of that right. But in effect he says—with "fear or intimidation." These subjective and self serving and self imposed disabilities do not constitute such a civil right as is contemplated by 42 U.S.C. §1983. These non objective complaints are in no wise referred to or contemplated by the other Federal Statutes now referred to—42 U.S.C. §1981 and 1982. (Petitioner's brief, pg. 4). Nor has any conspiracy ever been alluded to, pleaded or urged heretofore to warrant reference to 42 U.S.C. §1985 now quoted in Petitioner's brief (pg. 5-6).

As to whether *N.J.S.* 59:3-2(a) is repugnant to 42 U.S.C. §1983 it is respectfully submitted that it is not.

N.J.S. 59:3-2(a) was intended to codify the existing law of the State of New Jersey which immunized a public employee for the exercise of discretion within the scope of his duties.

It, in effect, preserves common law immunities. *Woodsum v. Pemberton Township*, 172 N.J. Sup. 489, 517 (Law Div. 1980).

In *Visidor Corp. v. Cliffside Park*, 48 N.J. 214 (1966) Mr. Justice Jacobs speaking for a unanimous Supreme Court stated at page 221:

> "It may here appropriately be noted that the non liability of individual public officials for damages ensuing upon their good faith exercise of judgment and discretion in the performance of their duties has long been recognized in our State." (citing cases)

In this last cited case, Mr. Justice Jacobs, noted the Federal Tort Claims Act, 28 U.S.C.A. §2680 (at pg. 219).

Certiorari by the United States Supreme Court was denied 386 U.S. 972; 18 L.Ed.(2) 132; 87 S. Ct. 1166.

This case preceded in time the enactment of the New Jersey Tort Claims Act, which was enacted in 1972. (*N.J.S.* 59:1-1 *et seq.*).

Thereafter in several New Jersey cases, *T & M Homes, Inc. v. Township of Mansfield*, 162 N.J. Sup. 499 (Law Div. 1978); and *Woodsum v. Pemberton Township*, 172 N.J. Sup. 489 (Law Division 1980) in which consideration of the New Jersey Tort Claims Act and 42 U.S.C. §1983 was involved, and in which cases it was held that Federal rights cannot be denied by the passage of a state statute and that the New Jersey Tort Claims Act which excuses municipalities and their officials from liability with respect to discretionary acts did *not* bar suit against municipality and officers of the municipality charging a violation of Federal rights—yet, nevertheless it was held that the public officials (as distinguished from the municipality) were immune. (See *T. M. Homes, supra*, 511-513; *Woodsum, supra*, 522).

That *N.J.S.* 59:3-2(a), which codified the common law immunities for public employees for the exercise of discretion within the scope of such employee's duties, is not repugnant to 42 U.S.C. §1983 is supported by the determinations of the Supreme Court of the United States with respect to other and similar problems involving personal liability of government officials. Thus in *Owen v. City of Independence*, 445 U.S. 622, 632 Ed. (2) 673, 100 S.Ct. 1398 (April 1980), it was held at 445 U.S. 637; 63 L.Ed. (2) 684, as follows:

"[445 U.S. 637]

> However, notwithstanding §1983's expansive language and the absence of any express incorporation of commonlaw immunities, *we have, on several occasions, found that a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that "Congress would have specifically so provided had it wished to abolish the doctrine."* Pierson v. Ray, 386 U.S. 547, 555, 18 L.Ed. 2d 288, 87 S. Ct. 1213 (1967). Thus in Tenney v. Brandhove, 341 U.S. 367, 95 L.Ed. 1019, 71 S. Ct. 783 (1951), after tracing the development of an absolute legislative privilege from its source in 16th-century England to its inclusion in the Federal and State Constitutions, *we concluded that Congress "would [not] impinge on a tradition so well grounded in history and reason by covert inclusion in the general language" of §1983.* 341 U.S., at 376, 95 L.Ed. 1019, 72 S. Ct. 783.
>
> Subsequent cases have required that we consider the personal liability of various other types of government officials. Noting that "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages

for acts committed within their judicial jurisdiction," Pierson v. Ray, supra, at 553-554, 18 L.Ed. 2d 288, 87 S. Ct. 1213, held that the absolute immunity traditionally accorded judges was preserved under §1983. In that same case, local police officers were held to enjoy a "good faith and probable cause" defense to §1983 suits similar to that which existed in false arrest actions at common law. 386 U.S. at 555-557, 18 L.Ed. 2d 288, 87 S. Ct. 1213. Several more recent decisions have found immunities of varying scope appropriate for different state and local officials sued under §1983. See Procunier v. Navarette, 434 U.S. 555, 55 L.Ed. 2d 24, 98 S. Ct. 855 (1978) (qualified immunity [445 U.S. 638] for prison officials and officers); Imbler v. Pachtman, supra (absolute immunity for prosecutors in initiating and presenting the State's case); O'Connor v. Donaldson, 422 U.S. 563, 45 L.Ed. 2d 396, 95 S. Ct. 2486 (1975) (qualified immunity for superintendent of state hospital); Wood v. Strickland, 420 U.S. 308, 43 L.Ed. 2d 214, 95 S. Ct. 992 (1975) (qualified immunity for local school board members); Scheuer v. Rhodes, 416 U.S. 232, 40 L.Ed. 2d 90, 94 S.Ct. 1683, 71 Ohio Ops 2d 474 (1974) (qualified "good faith" immunity for state Governor and other executive officers for discretionary acts performed in the course of official conduct).

[1b] In each of these cases, our finding of §1983 immunity "was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." Imbler v. Pachtman, 424 U.S. at 421, 47 L.Ed. 2d 128, 96 S. Ct. 984. Where the immunity claimed by the defendant was well established at common law at the time §1983 was enacted, and

where its rationale was compatible with the purposes of the Civil Rights Act, *we have construed the statute to incorporate that immunity.*" (emphasis added)

Further at 445 U.S. 652, 63 L.Ed.(2) 694:

"Our previous decisions conferring qualified immunities on various government officials, see supra, at 637-638, 63 L.Ed.2d, at 684-686, are not to [445 U.S. 653]

be read as derogating the significance of the societal interest in compensating the innocent victims of governmental misconduct. *Rather, in each case we concluded that overriding considerations of public policy nonetheless demanded that the official can be given a measure of protection from personal liability.*" (emphasis ours)

Further at 445 U.S. 657, 63 L.Ed.(2) 697:

"We believe that today's decision, together with prior precedents in this area, properly allocates these costs among the three principals in the scenario of the §1983 cause of action; the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity. (The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. *The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole.* And the public will be forced to bear only the costs of injury inflicted by the "execution of a government's policy or custom, whether made by its lawmakers or by

those whose edicts or acts may fairly be said to represent official policy." (emphasis added)

Gomez v. Toledo, 446 U.S. 635, 64 L.Ed.(2) 572, 100 S. Ct. 1920, likewise holds that there do exist immunities to the "expansive" language of 42 U.S.C. §1983. (See 446 U.S. 639, 64 L.Ed.(2d) 577).

It is respectfully urged that *N.J.S.* 59:3-2(a) is not incompatible with or repugnant to 42 U.S.C. §1983 by reason of the immunities which exist as recognized by the Supreme Court in *Owens, supra; Gomez, supra*, and the additional cases cited in those cases.

3) The immunity granted a public employee by the New Jersey Tort Claims Act is lost if it is established that his conduct was outside the scope of his employment or constituted a crime, actual fraud, actual malice, or willful misconduct. It is specifically provided that such a public employee shall be subject to "the full measure of recovery applicable to a person in the private sector if it is established that his conduct was outside the scope of his employment or constituted a crime, actual fraud, actual malice, or willful misconduct." (*N.J.S.* 59:3-14).

It was the intent of this provision that a public employee guilty of outrageous conduct be deprived of the immunity granted by the Act.

It is respectfully submitted that this is additional matter supporting the compatibility of *N.J.S.* 59:3-2(a) with 42 U.S.C. §1983.

In the case at bar the action of the Respondent in changing the working hours of the Petitioner and requiring him to "spend more time in the office and less time driving around personally supervising" (Petitioner's brief pg. 12(a)) was not action based on "color of any statute, ordinance, regulation, custom or usage of any State or Territory . . ." It was nothing more than an order by a

superior to a subordinate dealing with hours of employment and conditions of employment, made entirely within the scope of Respondent's duties and responsibilities and in his bona fide discretion and judgment that what he was doing was in the best interest of his department and the Town of West New York.

Petitioner's resultant insubordination and tactics on the job have resulted in this long and protracted litigation now brought to the highest Court of the United States. The simple problem involved here has been twisted and tortured into a "Civil Rights" action under 42 U.S.C. §1983—although never urged and never pleaded.

It is respectfully urged that 42 U.S.C. §1983 was never intended to be put to use in alleviating petitioner's self-imposed, self-serving subjective fears in running for unspecified public office at some time in the unspecified future.

4) The judgment below of the Superior Court of New Jersey, affirmed by the Appellate Division was rendered solely on issues of law entirely apart from "Facts."

a) The petitioner had failed to exhaust his administrative remedies. As noted in the opinion of the Superior Court (Petitioner's brief—13a): "Underlying the complaint is the motion that this is political harassment, that the defendant Director is motivated by political consideration. That's precisely and exactly the reason why the people of the State of New Jersey created the Civil Service system. The defendant is in the Civil Service and if he thinks he's being discriminated against for political reasons and if he thinks that the—that what is being done to him is inappropriate and improper, it is his responsibility to take it to the Civil Service Commission. . ." The Appellate Division in its opinion stated (Petitioner's

brief pg. 4a): "If it is otherwise, plaintiff has failed to exhaust his administrative remedies in a matter which, if anything, seems particularly appropriate for Civil Service Commission consideration. . . ."

(As indicated earlier in this Brief—the matter is now pending before the Civil Service Commission). If in fact the Petitioner had obtained an adjudication from the Civil Service Commission that his rights as a Civil Service employee had been violated, he could have then brought an appropriate action for such violation. The subject matter of scheduling hours and conditions of employment are subjects greatly involving expertise and special competence of the Civil Service Commission, and the Superior Court should not have been called on to substitute its judgment as to whether Petitioner's hours of employment should be from 6:30 A.M.,—1:30 P.M., or from 7:30 A.M., to 2:30 P.M., and which would be of greater advantage to the municipality and which hours would result in greater efficiency in operations.

b) The Superior Court, as well as the Appellate Division held that the Complaint failed to state a claim upon which relief could be granted by reason of *N.J.S.* 59:3-2(a). The Respondent had acted solely and only in his official capacity as the Director of the Department of Public Works in a matter lying entirely within his judgment or discretion.

This likewise was entirely correct and proper since there was nothing then before the Court with respect to 42 U.S.C. §1983.

CONCLUSION

For all of the foregoing reasons, it is respectfully urged that Petitioner's application for a writ of certiorari should be denied.

1) The federal question was never raised below so as to confer jurisdiction upon the Supreme Court to review the judgment on writ of certiorari. 28 U.S.C. §1257 (3); Rules of the Supreme Court, *Rule* 21(h).

2) *N.J.S.* 59:32(a) is not repugnant to 42 U.S.C. §1983, since with respect to immunities firmly rooted in the common law "Congress would have specifically so provided had it wished to abolish the doctrine" and "that Congress" would [not] impinge on a tradition so well grounded in history and reason by covert inclusion in the general language "of §1983." *Owen v. City of Independence, supra.*

3) The Judgment of the Superior Court of New Jersey, affirmed by the Appellate Division of the Superior Court, was in all respects proper. The Petitioner did fail to exhaust his administrative remedies, and his complaint did fail to state a claim upon which relief could be granted.

Respectfully submitted,

/s/ Sydney I. Turtz
SYDNEY I. TURTZ
Attorney for Respondent

Petitioner's Reply Brief

No. 81-470

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In The

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LOUIS R. DANIELLO,

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JOSEPH P. OLIVETI,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

QUESTIONS PRESENTED

1. Was the supremacy of federal civil rights law (42 U.S.C. §1983) over a state immunity statute [N.J.S. 59:3-2(a)] adequately presented to the Appellate Division of the Superior Court of New Jersey, so as to permit the petition for certiorari to the United States Supreme Court upon its upholding of the state immunity statute?

2. Would a state statute such as N.J.S. 59:3-2(a) which purports to immunize federal civil rights violations if part of alleged state law "discretion" of a state official, be repugnant to the Federal Civil Rights Act, 42 U.S.C. §1983 and the Supremacy Clause (Art. VI) of the United States Constitution?

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STATEMENT OF FACTS AS TO WHETHER FEDERAL QUESTION WAS PRESENTED BELOW

Respondent's brief contends that the question of federal constitutional and civil rights violations were never presented to the New Jersey Superior Court, Appellate Division.

An examination of the pertinent portions of the briefs filed in the Appellate Division and attached hereto as a supplemental appendix, belies such contention (1sa-6sa).

In petitioner's original complaint (pars. 17 and 20; p. 11 of petition for certiorari to the United States Supreme Court) petitioner charged that respondent damaged petitioner ". . . as an American . . ." by oppressing him and ". . . deprives him of his civil rights to run for public office without fear or intimidation . . ." by punishing him after the election for running for public office against respondent.

In the Appellate Division brief, petitioner specifically cited *Halperin v. Kissinger,* 606 F. 2d 1192 (U.S. Ct. of App., D.C. Cir. 1979), as well as *Elrod v. Burns,* 427 U.S. 347 (1976), 49 L. Ed. 2d 547, 96 S. Ct. 2673, which involved tort actions for deprival of First Amendment rights, and it is for this reason that petitioner specifically stated in his brief before the Appellate Division:

> "Here defendant Oliveti does violate Daniello's First Amendment rights." (4sa).

He further stated he was pursuing his tort remedy because of

> ". . . invasions and violations of plaintiff's constitutional right to run for public office . . ." (5sa).

Finally, when the petition for certiorari to the New Jersey Supreme Court was filed, and 42 U.S.C. §1983 was cited and argued with civil rights cases and the supremacy of federal law in this field, no contention was made that such question was not presented to, and decided by, the Appellate Division.

AS TO NEW JERSEY CIVIL SERVICE COMMISSION PROCEEDINGS

Respondent improperly argues the merits in its "Counter-Statement of the Case" and also injects false claims, such as that petitioner is seeking relief before the New Jersey Civil Service Commission for the tort ". . . grievances complained of in the case here under consideration." (p. 9). This is not true. Respondent knows very well that the Civil Service Commission has no tort jurisdiction for past civil rights violations.

NEW PETITION FOR REHEARING BEFORE THE APPELLATE DIVISION

Although surprised by the claim, petitioner is immediately petitioning the Superior Court of New Jersey, Appellate Division, for a rehearing, in case it may have missed the First Amendment civil rights question involved.

Petitioner suggests with deference that action on this petition for certiorari be deferred briefly by some interim order: (1) to allow the Appellate Division to consider such petition for rehearing; (2) subsequent thereto when informed by letter of the outcome of such petition for rehearing, that appropriate action be taken on this petition for certiorari.

I.

ON POINT ONE OF ANSWERING BRIEF (ALLEGED FAILURE TO RAISE FEDERAL QUESTION)

It may be that respondent relies on a technicality, namely that 42 U.S.C. §1983 was not cited by specific number in the Appellate Division brief, but only in the New Jersey Supreme Court.

Such claim cannot deprive petitioner of his action, as the number of the statutory section is not a necessary part of petitioner's action, nor is such omission fatal to his claim.

As stated in *Gomez v. Toledo*, 446 U.S. 635 (1980), 100 S. Ct. 1920, 64 L. Ed. 2d 572 at p. 577, the federal civil rights statute, 42 U.S.C. §1983:

> ". . . is to be construed generously to further its primary purpose."

It further held that, under the statute:

> ". . . two — and only two — allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person deprived him of a Federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law."

Furthermore, in its Appellate Division brief, respondent himself stated that petitioner was contending that respondent ". . . deprives him of his civil rights . . ." (6sa).

Finally, when certiorari was taken to the New Jersey Supreme Court and 42 U.S.C. §1983 was specifically cited by number with civil rights cases, no contention was made that the federal civil rights questions were not presented to the Appellate Division, and respondent in his brief (6sa) acknowledged that petitioner was complaining that respondent ". . . deprives him of his civil rights to run for public office . . . ."

However, if there is any doubt, the case should be reheard in the Appellate Division in the light of petitioner's contention that Article VI of the United States Constitution (Supremacy Clause) and such cases as *Testa v. Katt,* 330 U.S. 386, 67 S. Ct. 810, 91 L. Ed. 967 (1947); *Owen v. City of Independence,* 100 S. Ct. 1398, 445 U.S. 622, 63 L. Ed. 2d 850 (1980) and *Gomez v. Toledo,* 100 S. Ct. 1920, 446 U.S. 635, 64 L. Ed. 2d 572 (1980) preclude immunity from civil rights violations under 42 U.S.C. §1983 by a state statute.

II.

ON POINT TWO OF ANSWERING BRIEF [THAT STATE STATUTE N.J.S. 59-3-2(a) DOES NOT AFFORD STATE OFFICIALS IMMUNITY FOR FEDERAL CIVIL RIGHTS VIOLATIONS]

In effect, respondent argues that it is of no moment whether the immunity issue was ever considered below, because it contends that the state statute can afford immunity, *citing inter alia, Owen v. City of Independence,* 445 U.S. 622, 63 L. Ed. 2d 673, 100 S. Ct. 1398 (1980).

Without repeating petitioner's arguments on the original petition, this is clearly erroneous and requires reversal in this case.

Owen v. City of Independence, supra and *Toledo v. Gomez, supra,* hold:

> (1) that *federal courts* determine what immunity may exist, not a state statute purporting to amend or limit the federal law;
>
> (2) and then only as a *defense* upon a showing of good faith;

which would preclude summary judgment in this case where bad faith, malice and knowing misconduct and political retaliation are charged by petitioner.

CONCLUSION

Unless a brief delay is appropriate to allow the Superior Court of New Jersey, Appellate Division, to consider petition for rehearing, petitioner submits that petition for writ of certiorari should be granted in this case.

Respectfully submitted,

JOHN TOMASIN
Attorney for Petitioner

SUPPLEMENTAL APPENDIX

PERTINENT PORTIONS OF APPELLATE DIVISION BRIEF

[Commencing at page 29]

16. Both Oliveti and the Court below apparently take the view that if one has an official position, all actions taken are automatically official actions.

Such is not the case.

17. That an action for tortious deprivation of constitutional rights, such as the right to run for public office, is maintainable cannot, or should not, be doubted.

18. As stated in *Halperin v. Kissinger, et al,* U.S. Court of Appeals, D.C. Circuit 606 F.2d 1192 (1979) in reversing and remanding the District Court, even in the case of a President and Secretary of State (p. 1207)

> "Damage suits for the vindication of individual rights date from the eighteenth century in England, and have been widely recognized in our courts. The Supreme Court stated in Bivens v Six Unknown Named Agents of Federal *Bureau of Narcotics,* '(D)amages have been regarded as the ordinary remedy for an invasion of personal interest in liberty.' The instant suit is squarely within this tradition, and the Halperins are 'entitled to recover money damages for any injuries (they have) suffered as a result of the . . . violation of the (Fourth) Amendment.' Even if a constitutional violation inflicts only

intangible injury, compensation is still appropriate."

and again on page 1208 the Court stated:

> "We think that conclusion neglected the possibility that plaintiffs show loss due to emotional distress and mental anguish, traditional bases for tort recovery. Such harm might be demonstrated through direct testimony of the plaintiffs or might be 'inferred from the circumstances', and if established would surely entitle the Halperins to more than normal recovery. This court has held that in cases involving constitutional rights, compensation 'should not be approached in a niggardly spirit. It is in the public interest that there be a reasonably spacious approach to a fair compensatory award for denial or curtailment of the right . . .' Specifying such damages will always be difficult, but they must be at least 'an amount which will assure (the plaintiff) that (personal) rights are not lightly to be disregarded and that they can be truly vindicated in the courts.'"

19. This is in direct harmony with modern notions of the legal limitations on public officials, who may not damage public employees for political purposes.

Although in *past* years public employment depended on political considerations, in 1976 the United States Supreme Court, in *Elrod v. Burns*, 427 U.S. 347 (1976), 49 L. Ed. 2d 547, 96 S. Ct. 2673, held that persons could not lose public employment rights under the *1st Amendment* of the U.S.

Pertinent Portions of Appellate Division Brief

Constitution, just because they may exercise their constitutional rights to support other political parties or movements. The Court said, among other things (363) that if

> ". . . conditioning the retention of public employment on the employees support of the in party is to survive constitutional challenge, it must further some vital governmental and by a means that is least restrictive of freedom of belief . . ."

20. Plaintiff seeks to retain his *full* public employment and to do his job according to his job description, without illegal restraint or interference, just because he ran for public office.

21. No rational person could argue that the political fortunes of defendant Oliveti constitutes such ". . . vital governmental end . . ." or that defendant can violate town ordinances and policies with impunity, so as to deprive plaintiff of his full right to do his job and carry on his career, just because he ran for public office.

22. The First Amendment right of public employees to freedom of speech; freedom to run for public office, and the like, are protected in New Jersey, and due process is required before such rights can be curtailed. *Hall v. Mayor et al,* 170 N.J. Super. at p. 312 (1979) which stated:

> "The First Amendment right of freedom of speech as extended to public employees may be violated if rules or regulations impeding speech are unconstitutionally vague or overbroad."

Pertinent Portions of Appellate Division Brief

Citing *Jansco v. Waldron*, 70 N.J. 328 (1976) and *Rusignolo v. Orecho*, 70 N.J. 330, 337 (1976).

Here defendant Oliveti does violate Daniello's First Amendment rights. Not only are rules he applies vague, etc. — they are non-existent. In fact, he departs from, evades and defies and violates the applicable due process standard, namely Ordinance #1074, and its job description, with no legal justification whatsoever, except his own personal arbitrary plan, policy or scheme, carried on in bad faith, maliciously and with tortious intent to damage plaintiff and interfere with his economic prospects, for which he can be liable for compensatory as well as punitive damages.

23. As stated in *Schlesinger v. Rice*, 4 NJ 197 (1950) 72 A.2d 197 at p. 202

> "The right to pursue one's business calling or occupation free from undue interference or molestation is one which may not be infringed with impunity."
>
> "Malicious interference with one's business is actionable."
>
> *p. 203*
>
> "Malice may be inferred from the absence of just cause or excuse."

24. Defendant spoke of "exhausting remedies" in the Civil Service Commission, but itself points out that the salary, benefits, title and rights under the limited Civil Service jurisdiction have *not* been violated.

Pertinent Portions of Appellate Division Brief

The Civil Service Commission has also so stated.

Since the questions are those of *tort* law for *past* invasions and violations of plaintiff's constitutional right to run for public office and to pursue his occupation free from tortious and malicious

> ". . . interference or molestation . . ."
> *Schlesinger v. Rice*, supra

and questions of tort and public law are involved, there is no valid Civil Service tort remedy, and the Court should proceed on the tort actions; the claims for restitution of public funds and declaratory Judgment on behalf of plaintiff, within the principles enunciated by (then Judge) Pashman in *Hudson County National Bank v. Provident Inst. for Savings*, 80 NJ Super 339 Ch. 1963) 193 A2 697 at p. 708 aff'd 17 NJ 297 (1955).

Such legal issues are outside the jurisdiction of the Civil Service Commission and include (a) tort liability; (b) compensatory damages; (c) punitive damages to discourage public officials from manipulating public funds for malicious private purposes, which damages may exceed the compensatory damages; (d) restitution of public funds unlawfully diverted and improperly applied and wasted; (e) improper and illegal expenditure of additional public funds to cover up or defend actions rooted in malice and unlawful; (f) declaratory Judgments relating thereto.

It is submitted that based on these principles, a cause of action for damages does exist for damages already done to plaintiff, and trial should proceed thereon.

EXCERPT FROM APPELLATE DIVISION BRIEF OF RESPONDENT OLIVETTI

[Commencing at p. 5]

* * *

It has been emphatically denied by certification of the defendant that the action of the defendant "unlawfully punishes plaintiff" or that it "deprives him of his civil rights to run for public office" or that it "tortiously interferes with his right to make a living in the position earned" or that it interferes with "his reasonable right to improve his economic prospects and expectations without lawful oppression" (claims of plaintiff — Par. 20 — lst Count — Pa20) (Pa66-19 to 23).